IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1818 of 1999

For Approval and Signature:

Hon'ble MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

SHAILY ENGINEERING PLASTICS LTD

Versus

DESIGNATED AUTHORITY UNDER KARVIVAD SAMADHAN SCHEME

Appearance:
MR SN SOPARKAR for Petitioner
MR MANISH R BHATT for Respondent No. 1, 2

CORAM : MR.JUSTICE R.BALIA. and
MR.JUSTICE A.R.DAVE

Date of decision: 16/04/99

ORAL JUDGEMENT

#. This petition is relating to dispute which arises out of the special scheme enacted by the Finance Act of 1998 to settle the disputes under the direct tax as well as indirect taxes known as Kar Vivad Samadhan Scheme (hereinafter referred to as `KVSS').

#. The facts giving rise to this petition are that the petitioner which is a company has filed its return of income for assessment year 1996-97 on 29.11.1996 declaring a total income of Rs.1,19,69,413/- on which Rs.55,05,930/- was the amount of tax payable. The said amount was not paid by the assessee. On 18.11.1997, the second respondent assessing officer intimated to the petitioner under Section 143(1)(a) about making a prima facie adjustment to the income returned by the assessee by making additions of sums of Rs.1,12,12,567/- bringing the total taxable income at Rs.2,32,01,977/correspondingly specifying the increased tax liability of Rs.1,65,32,082/-. The assessee disputed the adjustment made under Section 143(1)(a) by filing appeal on 26.12.1997. However, the said appeal was not liable to be admitted for want of compliance with the requirement of subsection (4) of Section 249, namely, non payment of tax payable as per the return of the income. However, no order rejecting the appeal had been made. The assessee before filing appeal had moved an application for rectification also on 22.12.97 under Section 154 of the Income Tax Act, before the assessing officer. The assessing officer vide his order dated 27.7.98 partially accepted the application and reduced the adjusted income under Section 143(1)(a) to Rs.1,33,77,190/-. Corresponding thereto tax payable as specified in intimation was reduced to Rs.57,09,640/-. Thus as on 31.3.1998, under Income Tax Act the tax stood determined at Rs.57,09,640/-, under Section 143(1)(a) of the Act. The assessee had preferred a revision under Section 214 against the order dated 27.7.98 which was pending.

#. Under the Finance Act (2 of 1998) of 1998 which came into force with effect from 1.4.1998 a scheme known as Kar Vivad Samadhan Scheme was introduced which was contained in Chapter IV of the Finance Act of 1998 which comprised of Sections 86 to 98. The KVSS provided that where any person makes on or after the first September 1998 but on or before 31st day of December 1998 (the later date was extended by subsequent notification to 31st day of January 1999) a declaration to the designated authority in accordance with the provisions of Section 89 in respect of tax arrears, then notwithstanding anything contained in any direct tax enactments or indirect tax enactments or any other provision of any law for the time being in force, the amount payable under the scheme by the declarant is to be determined at the specified rates provided under Section 88, and on determination of such amount payable under Section 90(1) the declarant is

required to make payment within 30 days and intimate the same to designated authority with proof of such payment. On actual payment of the amount so determined by the person filing declaration would require a certificate to be issued under Section 90(2) which will result in concluding the matters covered by the order and immunity in respect of such matters from being reopened in any other proceedings under the relevant direct tax enactment or indirect tax enactment or under any other law for the time being in force.

#. For the present purposes, it further need be noticed that under Section 95 areas where no declaration was permissible to be filed were pointed out. One of the area where no provision under the scheme would operate was a case where no appeal or reference or writ petition is admitted and pending before the appellate authority or High Court or Supreme Court on the date of filing of declaration or no application for revision is pending before the Commissioner on the date of filing declaration in respect of tax arrear under any direct tax enactment. After the scheme became effective petitioner filed a revision before the Commissioner of Income Tax under Section 264 which was within limitation on 30.12.98. Thus fulfilling all the conditions, namely, tax was determined under Section 143(1)(a) prior to 31.3.98 and part of the tax payable as per such determination was unpaid, and a revision filed by the assessee petitioner disputing his liability filed within limitation was also pending before the CIT, when the petitioner filed declaration on 31.12.1998. Assessee's eligibility as declarant as on 31.12.98 is not in dispute.

#. Under Section 90(1) of KVSS the Designated Authority was to make an order determining the amount payable by the declarant within 60 days from the date of receipt of declaration. The order is required to set forth the particulars of tax arrear and sum payable towards full and final settlement of tax arrears. Within 30 days of the making of such order under Section 90(2) the declarant is required to pay the sum so determined by the designated authority He has also to intimate the fact of payment to the Designated Authority along with the proof thereof, on receipt of which the Designated Authority is to issue the certificate to the declarant.

#. After furnishing declaration on 31.12.1998, the next thing which assessee petitioner came to know was impugned order dated 26.2.99 passed by the Designated Authority recording that the Assessing Officer has informed the Designated Authority that in exercise of his

power under Section 154 on 26.2.1999 the Assessing Officer has deleted the entire adjustment made under Section 143(1)(a). Taking note of the order of Assessing Officer dated 26.2.1999, the Designated Authority who was also the authority before whom revision filed by the assessee, was pending, further held that in view of the fact that the Assessing Officer has deleted all the adjustments made to the returned income by rectifying his order under Section 143(1)(a) and has accepted the income returned by the assessee, no dispute as mentioned in revision petition under Section 264 dated 30.12.98 survives, and therefore, case cannot be referred under the scheme and accordingly declaration was dismissed as having become infructuous. The Designated Authority also referred to the fact that the petitioner had filed an appeal against prima facie adjustment made under Section 143(1)(a) which was yet to be disposed of but taking note of the fact that assessee had not deposited the amount of tax on the returned income as required under Section 249(4)(a), no valid appeal can also be said to be pending before the CIT (Appeals).

#. Many fold grounds have been raised challenging this order dated 26.2.99 rejecting the declaration and refusing to determine the amount payable under Section 88 read with Section 90 of the Finance Act (No. 2) of 1998 by the Designated Authority as a consequence of rectification order made under Section 154 by the Assessing Officer on 26.2.1999.

#. The first contention that has been raised before us is as to the validity of the order passed by the assessing officer under Section 154 on 26.2.1999, which according to the respondents had the effect of taking the case of the petitioner outside the purview of the scheme. The contentions are two fold. Firstly, that the order under Section 154, assuming it has potentiality to affect the assessee's eligibility to lose the benefit under the scheme, was certainly an order affecting the assessee adversely made without giving the assessee any opportunity of being heard. The order is not only violative of general principles of natural justice, but is in clear breach of the mandate of subsection (3) of Section 154. The second contention is that the order dated 26.2.1999 apparently suffers from malice in law. In the chain of events noticed above, it was urged that the assessing officer having already exercised his power under Section 154 on an application being made in that regard by the petitioner, has concluded the matter as to the prima facie adjustments to be made under Section 143(1)(a). As far as he was concerned, by application of

mind as early as on 27th July 1998 he had concluded the questions and no application for rectification was pending before him. His belief as to the chargeability of the amount in question to tax, which was not included by the assessee in his returned income, was still persisting. That is manifest from the fact that in regular assessment under Section 143(3) which has come into existence on 30.3.99, barely a month after the passing of the order under Section 154, again shows the very same additions in the returned income, by the very same assessing officer which has been deleted in purported suo motu exercise of jurisdiction under Section 154 without giving notice to the assessee, and the fact that proceedings for regular assessment had already been initiated by issuing notice under Section 143(2) much prior to having recourse to exercise of jurisdiction under Section 154. All these clearly suggest that exercise of jurisdiction under Section 154 on 26.2.1999 on his own by the Assessing Officer was not as a matter of any belief held by him as to there being any mistake apparent on the face of record in determining adjustment under Section 143(1)(a) but was purely with a view to infructuate the declaration filed by the assessee under Section 89 of the Finance Act of 1998 to receive benefits of KVSS.

#. Coming to the first contention it would be appropriate to reproduce the relevant clause of section 154:

"154.(1) With a view to rectifying any mistake apparent from the record an income-tax authority referred to in section 116 may, -

(a) xxxxxxxxx

(b) amend any intimation sent by it under subsection (1) of Section 143, or enhance or reduce the amount of refund granted by it under that subsection.

1A. xxxxxx

(2) Subject to the other provisions of this section, the authority concerned -

(a) may make an amendment under subsection (1) of its own motion, and

(b) shall make such amendment for rectifying any such mistake which has been brought to its notice by the assessee, and where the authority concerned is the Commissioner (Appeals), by the assessing officer also.

(3) An amendment, which has the effect of enhancing an assessment or reducing a refund or otherwise increasing the liability of the

assessee, shall not be made under this section unless the authority concerned has given notice to the assessee of its intention so to do and has allowed the assessee a reasonable opportunity of being heard.

(4) xxxxxxxxx

(5) Subject to the provisions of Section 24, where any such amendment has the effect of reducing the assessment, the assessing officer shall make any refund which may be due to such assessee.

(6) xxxxxxxx

(7) xxxxxxxx

##. The three expressions used in subsection (3) mandating a pre decisional hearing before order of rectifications can be made are `enhancing the assessment', `reducing the refund' or `increasing the liability of the assessee', All are in the context relatable to the determination of taxable income, reduction of refund as a result of enhancing the liability of tax, and otherwise, resulting in adverse effect on the assessee's liability arising under the Income Tax Act, which is its wider connotations includes not only the tax at specified rates on the taxable income, but also the interest and penalties payable in respect thereof. Such adverse orders may also be relating to determining the status of person as assessee though may not affect computations of income inasmuch as determination of status may affect rate of income tax applicable to a person depends on his status as well, attracting other provisions which in the end result in enhancing the liability of the assessee under the Act. It cannot be referrable to liabilities and obligations or rights beyond the precincts of the Income Tax Act. In this connection it would also be apposite to notice that the KVSS does not affect the liability of the assessee to any tax in any sense. In fact it does not adjudicate as to the liability of the assessee to assessment of income under the Income Tax Act or liabilities to tax under the different Acts mentioned in the schedule to scheme. KVSS only concerns the liability already determined and existing and remain outstanding because the assessee has failed to discharge such obligation. No part of the scheme determines the liability of the assessee that arise under the Income Tax Act or other different Acts. It only concerns itself with recovery of the unpaid tax as on the date of declaration, and to compute the amount payable in relation to such unpaid tax for giving an opportunity to the defaulter to make payment of amount so determined to gain immunity offered under the provisions

of the scheme. It is misconception to consider that the operation of the scheme is to decrease or increase in the liability of the assessee, which exist independent of the scheme, and is to be determined in accordance with the enactment under which the arrears are due. This is clear from the definition of `tax arrears' itself which postulates that the amount of tax penalty or interest must be determined on or before 31st day of March 1998, under the enactment in respect of an assessment year as modified in consequence of giving an effect to appellate order. Therefore, the existence of liability on account of tax penalty or interest is directly referrable to the determination under the enactment under which it is to be determined. Viewed in that light, by deleting the adjustment made under Section 143(1)(a) the assessing officer was neither enhancing the assessment nor it was an exercise which would result in reducing the refund or claim to refund, if any, nor deletion of such additions would result in enhancing of assessee's liability under the Income Tax Act in any manner. As a matter of fact deleting the additions made accorded with the claim made by the assessee since the date the adjustments under Section 143(1)(a) were made by the assessing officer and the assessee has challenged the same to be erroneous, promptly by filing an application under Section 154 on 22.12.1997 which was allowed only partly against which also the assessee had preferred a revision under Section 264. Making an order in favour of the assessee for which he has been litigating since beginning cannot be said to be an order enhancing the liability of the assessee otherwise within the meaning of Section 154(3) nor prejudicial to assessee under the enactment governing the tax in question, which would call for giving an opportunity of hearing before the order was made.

##. Considering the second contention we find there is substance in it. The chain of events noticed above leave no room of doubt that the purported exercise of power under Section 154 was clearly not referrable to any satisfaction on the part of the assessing officer as to the mistake committed by him in making adjustment under Section 143(1)(a), but was directed to infructuate the declaration made on 31.12.98 under the scheme which followed filing revision on 30.12.98 against the order dated 27.7.98. The assessing officer had made certain additions in the first instance on being satisfied prima facie about their apparent exigibility to tax in addition to returned income, on 18.11.1997. The assessee had filed an appeal against the intimation under Section 143(1)(a) on 26.12.97. However, before appeal was filed, which require as a condition to be admitted, payment of

tax as per the returned income, the petitioner had preferred a rectification application also before the assessing officer. The assessing officer had considered that application, accepted partly the claim of the assessee as to the debatability or nontaxability of additions made by the assessing officer to a large extent, but not fully. Notice under section 143(2) had also been issued for regular assessment during which the issue as to disputed additions could be agitated and brought back to assessment. Thus the proceedings had already reached at a stage where 143(1)(a) order as per the assessing officer had become final and was subject to Assessment order to be made under Section 143(3) for which steps were already taken by the Assessing Officer by issuing notice of hearing. The assessee had already availed of remedy against order under Section 154 by filing a revision under Section 264 within limitation. That by itself would not have prompted ordinarily the assessing officer to have recourse to Section 154 at that stage. The only thing that happened during this period appears to be the coming into existence of the scheme under which an assessee having tax arrears could avail benefit under certain conditions which requires, apart from existence of `tax arrear' as on the date of declaration pendency of appeal, reference or writ or a revision in relation to `tax arrear' before appropriate authority.

##. Before us it is not in dispute that intimation under Section 143(1)(a) making adjustments amounted to determination of tax under the Income Tax Act, the assessee has not paid the tax as per amount specified in intimation under section 143(1)(a) of the Act and the revision filed on 30.12.98, was within limitation hence could be said to be pending as on 31.12.1998 when declaration was filed. Remedy of appeal under the provision of the Income Tax Act could be available only if the assessee deposits a part of the amount of tax payable as per return. Assessee having not paid even the tax payable as per return was not entitled to maintain appeal. The Central Government in its guidelines issued on 1.9.98 in the form of question and answer had stated the scheme is available to entire demand of an assessment year. The only reason in the circumstances that prompted the assessing officer to make an order under Section 154 on 26.2.99, communicated to Designated Authority, who is also revisional authority, and can legitimately be inferred, is that as the assessee has entered the eligibility zone of KVSS scheme on the last date of making declaration on 31.12.98 by filing a revision on 30.12.98 and giving effect to that may result in

reduction of tax recovery even below the admitted tax liability under the return, the device of 154 was adopted, notwithstanding having no belief in non taxability of the items of addition already made. In proceeding under Section 143(3), which could be made on hearing, he had no intention to delete the addition and allow the tax reduction as per intimation under section 143(1)(a), which is apparent from the fact that having reduced the tax payable under Section 143(1)(a) on 26.2.99, by treating the additions to be a mistake apparent from order, an order which was not intimated to assessee, the officer hastened to make an order under Section 143(3) subjecting the assessment to same additions raising the liability to a level which would sustain the assessee to a person with `tax arrear' again. Viewed in this background the chain of events declaration was filed by the petitioner fulfilling all the contentions prescribed therein for availing whatever benefits the legislation offered under the scheme. Thereafter the order on the declaration is to be made within 60 days by the designated authority for determining the amount payable under the scheme by the declarant. That were to expire on 1st of March. On 26.2.99, the order is made under Section 154 in purported exercise of powers under Section 154 reducing the assessment to returned income. Same is communicated to the designated authority who dismisses the declaration and revision both by holding them to be infructuous, making a reference to the fact of appeal under Section 246 which had hitherto had not been disposed of making it doubly sure that the petitioner may not still be found entitled to operation of the scheme because of the pendency of appeal. The assessee is informed of the order under 154 through rejection of declaration, and before the close of assessment year the same demand is again created by making assessment order under Section 143(3). These chain of events clearly disclose that the assessing officer, right from the date of making adjustments under Section 143(1)(a) until the date of making the order under Section 143(3) had firmly believed that additions, finally sustained after partially allowing first application moved by the assessee under Section 154 were taxable income. There was no occasion for him to have revised intimation under Section 143(1)(a) suo motu at that stage unless it was directly concerned that giving a foothold for making declaration under the scheme infructuous.

##. Duty to act fairly is the backbone of the fundamental right of the citizens to be governed under the Constitution. This duty to act fairly inhers into it

that the power which is vested in an authority for a particular purpose had to be exercised for that purpose alone and not for extraneous consideration for a purpose different for which such power has been conferred. That would be abuse of authority. If such a case is made out, the action cannot be sustained.

##. Accepting the contention of respondent will be opening the gates of defeating legislative will. The legislature willed to provide a scheme to collect revenue from litigating assessee with outstanding arrears. The class to which this scheme was extended was an assessee with tax arrear in respect of which a dispute is pending on date of declaration. If the contention of respondent is accepted it will create a situation where notwithstanding on date of declaration an assessee fulfil the criterian under KVSS the department can before the date of determination by exercise of various powers under the relevant enactment reduce the liability to nil, deny the provision of scheme to assessee on the ground that no tax arrear is dispute exist and next day after rejecting the declaratiion redetermine the liability which will resurrect tax arrear as well as litigation, as has happened in this case demonstrably.

##. One cannot fail no notice that within sixty days of of declaration Designated Authority has to make an order under Section 90(1) determining the sum payable by the assessee towards full and final settlement of `tax arrears' and on payment of such sum within a period of 30 days from passing order under section 90(1) the assessee gets the consequential reliefs which include under Section 90(3) that every order passed under Section 90(1) determining the sum payable under the scheme shall be conclusive as to matters stated therein and no matter covered by such order shall be reopened in any other proceeding not only under the concerned tax enactment but also under any other law for the time being in force, and results in withdrawal of litigation pending at assessee's behest under Section 90(4). Thus by prohibiting reopening the matter pertaining to tax determination in respect of which tax was in arrear and directly withdrawal of pending litigation the legislature made it clear that dispute which is being litigated in respect of tax arrear as on the declaration must come to a conclusive end and not survive the recovery. By acting in a matter so that no recovery is made and dispute remain alive the authority only acts at cross purpose with the legislative will. In slightly different context, the Delhi High Court in AIFTA v. Union of India (Delhi) 236 ITR 1 found the distinction drawn under the

scheme on the basis as to who is the appellant or respondent in the litigation found the proviso to Section 92 ultra vires and read down the definition of `tax arrear' under Section 87 (m). The Court speaking through Laoti, J (as His Lordship then was) observed:

"In our opinion, once a liability to pay the tax was incurred and determined on or before March 31, 1998, the assessee would be treated to be in arrears in spite of his having succeeded at one stage of the litigation if the Revenue has chosen to continue with the litigation and there is no reason why the benefit of the scheme should be denied to him. to this extent, the scheme is discriminatory and violative of Article 14 of the Constitution. All the assessees litigating and in arrears belong to one class. Any attempt at carving out further classes by reference to who is the prosescutor/appellant/applicant in the pending litigation is void as based on no intelligible differentia. It is arbitrary, irrational and evasive. It will have no rational relation to the object sought to be achieved by the Act. The twin test laid down in R.K.Garg's case (1982) 133 ITR 239 (SC), would fail. On the other hand, keeping them in one class would enable the twin objectives of the legislation being achieved - (i) the reduction of litigation, and (ii) the realisation of revenue."

We are in respectful agreement. We are further told that Central Government by issuing a press note on 28.11.98 has accepted the verdict.

We are therefore of the opinion that the order made on 26.2.99 in purported exercise of Section 154 by the respondent No.2 assessing officer was tainted with ulterior object and was not exercised for the purpose for which the power was conferred on him. That vitiates the order dated 26.2.99 made under purported exercise of power under Section 154 without hearing the assessee, as it suffers from malice in law.

##. Even otherwise, we are satisfied that merely because there is modification or alteration in the quantum of tax arrears as on the date when order under Section 90(1) is to be made from the one which exist as on the date declaration was filed, as a result of orders which come into existence during the interregnum period to the extent permissible under the scheme, would not

make the declaration infructuous but at best may affect the determination of amount payable by the declarant, depending upon the dispute that continue to exist.

##. As the question directly do not arise in this petition we refrain from expressing any firm opinion on the exact amount with reference to which the quantum of amount payable under the scheme is to be determined. Prima facie, we are of the opinion that except in case where amount of tax, interest or penalty determined under the enactment as a result of orders made under the concerned enactment before the date of determination is reduced to zero and the revenue does not intend to dispute such result, the scheme operates so long there is `tax arrears' to be recovered. This is in consonance with the twin object of scheme which has its avowed object of declogging the system of pending litigations at different levels resulting in locking up of considerable revenue in such disputes, by providing a quick and voluntary settlement through recovery of sum determined in terms of KVSS in respect of tax arrear under various tax enactments both direct and indirect by offering waiver of part of `tax arrear' and providing immunity against institution of prosecution and imposition of interest and penalties. The twin objects of clearing arrears and settling disputes are intertwined and are not independent or separate. As has been noticed by Delhi High Court in All India Federation of Tax Practitioners v. Union of India and ors. (supra), while considering the question as to the validity of the scheme, the court observed:

> "The objective of the scheme is to realise the tax arrears along with reducing the litigation and not reducing the tax litigation merely. The two qualifications taken together make one and it is incorrect to attempt at treating the twin object as two objects to be seen in isolation of each other or to assign one ingredient more weight than the other"

##. Viewing the entire scheme in that light, the Court found that classification of the beneficiary of the scheme on the basis as to who is the disputant party at the stage when the scheme operates, cannot provide a valid ground for excluding or including a person to the benefits of the scheme. Thus finding, it had declared proviso to Section 92 as ultravires, and read down the definition of tax arrears in clause (m) of Section 87 by holding that definition of tax arrears in clause (m) of Section 87 of the Act of 1998 should be so read as to

mean amount of tax, penalty or interest determined by any competent authority on or before 31.3.1998 though such determination might have been set side at a later stage, if such setting aside has not been accepted by the department and continues to remain under challenge before a court or Tribunal. This had two fold outcome. Firstly, that scheme applies and operates notwithstanding subsequent modification in the amount of `tax arrear' at the time of making an order. Secondly, if the modification resulting in reduction of `tax arrear' as a result of reduction in amount of tax determined is not acceptable by the revenue, still the scheme operates. In that event the scheme operates by ignoring the reduction as a result of existing order.

##. The above declaration of law as to the validity of proviso to Section 92 and reading down of clause (m) of Section 87 has been accepted by Union of India by issuing a press note released on 26.11.98. Thus the revenue has accepted that even in case as a result of subsequent decision tax liability is reduced that is subject matter of dispute in future, the conditions of the scheme having been satisfied enabling a person to make a declaration would not disentitle him to the benefit ofthe scheme. He is entitled to insist for an order under Section 90(1) for computation of amount payable under the scheme by ignoring the order passed in his favour and to secure immunities and benefits from levy of interest penalty in prosecution by not desiring to enter into the field of litigation any further.

##. Taking any other view in the circumstances, would mean that the scheme would remain wide open to abuse by making the declarations infructuous just before the D day for determining amount payable by making orders under the respective enactments, reduce the tax liability or deleting the tax liability temporary in exercise of powers under the relevant tax enactment and restoring proceedings by resorting to the Act. This is amply demonstrated in the present case. The liability of the disputed sum was deleted a few days before the designated authority was under an obligation to make an order on the existing state of affairs, resulting in making of the impugned order which has not intended to be sum ordered and the very same liability was restored by regular assessment under Section 143(3) of the Income Tax Act which may further be subjected to litigation the arrears still remaining outstanding. If the view now commended by the revenue is to be accepted, it would result that notwithstanding the valid declaration having come into existence under which the existing dispute could be

buried and outstanding tax arrear would be recovered on that basis as per KVSS statutorily sanctioned the litigation and arrear shall still continue to exist, without giving it a chance to settle under the statutory scheme brought into existence for that purpose alone. Whatever be the merit of scheme, its validity cannot be questioned by the authorities created under the particular enactment, nor the purpose be defeated by such methodology.

##. It has been urged by learned counsel for the revenue that even if it be accepted that merely because of the making of an order under Section 154 deleting the additions made may not result in making the declaration infructuous, but, it must result in atleast continued existence of the necessary condition for the operation of the scheme. He develops his argument thus : mere existence of tax arrears does not give right to any tax payer to enter the scheme for procuring its benefits. It also posits that apart from there being `tax arrear' there must be an existing dispute in respect of such tax arrears. There cannot be any existing dispute in respect of admitted tax liability. As on account of reduction of assessment to the returned income by the impugned order under Section 154 the tax liability has been reduced to the admitted amount no part of tax arrears as on the date the order was made or order could be made that would call for determination of amount under Section 88 of the KVSS under Finance Act (No. 2) of 1998.

##. Having given our careful and anxious consideration to this contention we are unable to accept it. Undoubtedly, it is true that pending litigation or dispute is necessary condition for entering the field of the scheme. It is reflected from the provisions of Section 88 as well as 95 of the Finance Act of 1998. The amount to be determined under Section 88 is with reference to disputed income, disputed wealth, disputed gift, disputed chargeable expenditure, disputed chargeable interest. Section 95 makes it abundantly clear that unless an appeal or reference or writ petition is admitted and pending before any appellate authority or High Court or the Supreme Court on the date of filing of declaration or application or revision is pending before Commissioner on the date of filing declaration the provisions of the scheme would not apply. So also in the case of indirect tax enactments the provision that in case where no appeal or reference or writ petition is admitted and pending before appellate authority or High Court or Supreme Court or no application for revision is pending before Central Government on the date of

declaration made under Section 88 the provision of the scheme shall not apply. These provisions leave no room of doubt that it is only that assessee who can attract the provisions of the scheme who has `tax arrears' and a live dispute pending in respect of such tax arrear. The provisions as enacted rule out the possibility where a dispute at higher echelons is pending at the instance of revenue and assessee is not disputing that liability because order as on that date is in his favour. The Delhi High Court in the decision referred to above have held this distinction to be ultravires and has read down the definition of tax arrears as noted above. The decision which has been accepted by Union of India must be taken to be now governing the scheme. If that be so, necessary consequence would be that where there exists a tax arrear within the meaning of Section 87 and a dispute is pending at the date of declaration its subsequent decision, which is not final, before the order under Section 90(1) is made, cannot affect the operation of the scheme, even if it may affect the determination of quantum to be determined as payable by the assessee. Prima facie we are of the view that the determination of amount may take into consideration the exact tax arrears as on the date of determination, with addition of tax amount which was in arrears as on the date of declaration but ceased to be payable as per the later decisions in any proceedings under the concerned enactment, where the revenue is still disputing the reduction in such liability. Taking any other view would mean that notwithstanding fulfilling all the conditions for invoking the provisions of the scheme as on the date of filing declaration on the filing of which it vest a right in the assessee that amount payable by him under the scheme is determined and on such determination if he makes the payment within time allowed, the dispute as to determined tax comes to an end and he is entitled to the benefits under the scheme. Obviously if the arrears are not cleared in terms of the scheme the position remains as it were.

##. It is to be noticed that Section 87(m) defines the tax arrears to mean unpaid tax liability which was initially determined on or before 31st March 1998 as it stands modified by subsequent orders under the relevant enactments, before the date of making declaration, remains unpaid. So also requirement of pendency of appeal or revision is referrable to the date of declaration. Therefore the basic concept of tax arrears as well as the conditions which make a person eligible to make a declaration of tax arrears have direct relevance to the date of declaration. While the condition that

there must be dispute pending in respect of tax arrears, there is no such condition which requires or can lead to this conclusion that tax arrear would constitute only such tax arrears which are disputed and not the arrears in respect of admitted tax liability. Therefore once the case is made out that the assessee was a person who had `tax arrears' as on the date of making declaration and dispute was also pending in respect of such `tax arrears' which may not concern the entire amount of `tax arrears' he is entitled to make a declaration and claim the benefits that may have to be computed in accordance with the provisions of the Act. The subsequent determination of pending dispute which does not wipe out the tax liability of the arrears altogether cannot make the case falling in category where there are no tax arrears within the meaning of Section 87(m). Even in respect of a case where as a result of orders made under the relevant taxing statute tax liability is set aside altogether or reduced but such order is not accepted by the revenue and is subject to remedial proceedings under such enactment, we have already notice that in view of now accepted position the scheme operates and pending dispute as to enhance the liability too comes within the purview of KVSS, so that dispute stands settled in favour of revenue on payment of sum determined under KVSS. This is so because in that event, the assumption of tax arrears has to be on the basis as if determination of liability under tax concerned tax enactment in respect of tax, interest or penalty has been in favour of the revenue. That is necessary corollary of reading down Section 87(m) to include liability as reduced by orders under enactment but disputed by the department. However, if the revenue accepts the reduced liability the question of computing benefit to that extent shall not arise as the same shall cease to be a `tax arrear' in respect of which dispute is pending. The concept of `dispute', existence of tax liability is primarily to relate the scheme to the twin objects of settlement of dispute on payment of amount computed under the scheme which results in clearance of tax arrears. That can reasonably lead to conclusion that benefit of computation at reduced rate may be related only to the disputed tax, and not to the undisputed tax. That is the prima facie opinion to which we have come by perusing the scheme as a whole. Section 88 provides for settlement of tax arrears. While it provides for computation of tax arrears in respect of disputed income at the rates prescribed under clause (a) of Section 88, Section 90(1) requires setting forth of tax arrears and sum payable after determination of arrears after full and final settlement of arrears. Looking to the scheme of the Act one plausible view appears to be that as the

scheme does not apply where there is no dispute between the assessee and revenue and the tax determined and arrears of tax are admitted, the benefit which has been extended under the scheme is only to settle disputed liability by reducing the extent of that disputed liability as provided under Section 88, and require the payment of reduced liability of the disputed tax maximum to such extent the same is outstanding, along with full admitted tax, if the same is outstanding, and to grant immunity from liability of interest, penalty and prosecution etc. In case there are no arrears of tax but only of interest and penalty, demand in respect of such arrears is reduced to half. That construction saves the provision from the vulnerability to fall foul with Article 14 on the ground of hostile discrimination. A person who for any reason has not paid admitted tax but is honest in his declaration is placed to a disadvantage position vis-a-vis a person not so transparent assessee whose tax declaration are not found acceptable and addition in income has been made, interest and penalties levied and also with those assessees who have recourse to even a wholly untenable dispute the benefit of reduction in tax liability is extended to admitted tax liability as well, inasmuch as a non disputant assessee is prohibited to get any benefit under KVSS, a disputant assessee will get benefit not only in respect of tax arrear in respect of which dispute is pending, settlement of which is one of the purpose, but also in respect of undisputed liability, when recovery of all arrears is not the sole purpose but is intertwined with settlement of dispute. In such event, a case of honest assessee being unequally treated is prima facie made out.

##. The other view contended by learned counsel for the petitioner is that in view of the definitions given to disputed tax and disputed income, once the declarant enters the field of applicability of the scheme, he is entitled to computation of amount payable towards full and final settlement of tax arrears would include determination of amount in respect of undisputed liability as well.

##. As the question was not examined by the revenue authorities and does not directly arise before us, we refrain ourselves from expressing any final opinion on the issue.

##. In view of our conclusion that order under Section 154 dated 26.2.99 is vitiated and that the proceedings would not become infructuous by dint of that order and that we have also reached conclusion that even in case

the existing tax liability which included both admitted as well as disputed liability is reduced to admitted liability as a result of a subsequent order (assuming the order under Section 154 to be valid), it still does not take the case outside the purview of the scheme though it may affect the question of determining the quantum of amount payable under the scheme which will have to be determined by the designated authority, in accordance with law, at the time of determination of amount of tax payable. Where the scheme has been invoked the entire amount which is unpaid as on the date of declaration and as on the date when the order is being made falls within the definition of `tax arrears', merely because the amount which is considered to be `tax arrear' as on the date of order is an admitted tax would not make the declaration, which was valid at the time of making it, infructuous and inoperative, particularly keeping in view if the dispute about the order which has resulted in reducing the quantum of unpaid tax as on the date of making an order, is not acceptable to department, would still be governed by the scheme in view of the decision of Delhi High Court referred to above and accepted by the Union of India. The impugned order of the Designated Authority also will have to be quashed, as the same is solely founded on the fact that no dispute is pending as on the date of making order because of orders under Section 154 and rejection of revision application on 26.2.99, though the facts disclosed that the reduced sum of tax was never accepted by the revenue.

##. Accordingly, the order of the second respondent the Assessing Officer dated 26.2.99 under Section 154 of the Income Tax Act, as well as the order of the Commissioner Designated Authority dated 26.2.99 to the extent it rejects the declaration under KVSS as having become infructuous are set aside and the Designated Authority is directed to consider the declaration afresh in accordance with law.

(Rajesh Balia, J)(A.R. Dave, J)